No. 10,412.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN GENERAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

L. L. BOOZE, FRANK L. VINCENT, an individual, FRANK L. VINCENT, doing business under the firm name and style of Vincent's Dairy,

Appellees.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

Preliminary Statement.

The appellee, Frank L. Vincent, has greatly amplified the factual background of this case. It was our feeling that the opening brief sufficiently presented the matter to the Court, but certainly, with appellee's reply, there should be no question of these facts.

Our complaint in the court below alleges that Vernon Booze at the time of his death was an employee of the defendant Frank L. Vincent, acting within the scope of his employment, and that the death was occasioned on the 3rd day of August, 1941, as the result of an automobile action

at an intersection, involving the vehicles owned and driven respectively by Frank L. Vincent and Ray White.

Likewise it should now appear that there is no conflict over the proposition that a case has been brought in the State Court in California, by the father of Vernon Booze, and that this case is predicated upon the claim of wilful misconduct—that is to say, is predicated upon the claim that Vernon Booze was a guest, riding on the automobile of Frank L. Vincent as such, at the time the accident occurred.

The controversy therefore necessarily arises out of the conflicting claims of appellant, American General Insurance Company, and appellee. If it is true that deceased was a guest, rather than an employee, of Frank L. Vincent, then American General Insurance Company owes to Frank L. Vincent a defense in the State Court case. On the other hand, if deceased was an employee of the defendant Vincent, the policy of American General does not apply—in fact, cannot lawfully apply—because it is not a workmen's compensation policy, and further because of the fact that such coverage is specifically excluded.

In this closing presentation the briefer is attempting to follow the order in which the statements are presented in the reply brief of Frank L. Vincent.

Reply Argument to Statement Contained in Appellee's Brief Under the Heading "Statement of the Case."

Under the heading of "Statement of the Case," appellee sets up the general insuring clause, Section I, Coverage A. If, for the minute, we exclude the question of whether or not it would be lawful under our Workmen's Compensation Act to issue such a policy covering an employee, and if we then were to assume that the general insuring clause was the only insuring clause in the policy, there might be something to be said for the contention of appellee. However, the position thus taken by appellee entirely fails to allow for the additional rule of interpretation, to the effect that specific exclusions stated in the policy are in limitation of the general insuring clause. That is to say, as to any situation which is expressly excluded from coverage by the terms of the policy, that express exclusion is a limitation on the general insuring clause.

Thus, in the case of *Maryland Casualty Co. v. Texas Fireproof Storage Co.*, 69 S. W. (2d) 826 (Texas Civ. App. 1934), in considering a like problem it was held in the lower court that exclusion clauses, which if interpreted in their normal meaning would have limited the right to recovery under the general insuring clause, were repugnant to the general terms of the policy, and therefore inoperative. This decision was reversed on appeal and, in discussing the matter, the Court states at page 828:

> "The clause in the policy sued on which obligated appellant to indemnify appellee, as the same has been hereinbefore recited, was expressly made 'subject to the limitations, conditions and exceptions hereof.' Said obligation, so far as applicable here, was to indemnify

> appellee against liability for accidents caused by certain of its employees in the course of their employment occurring elsewhere than on the particular premises described in the policy. It was general in its terms, and unless limited by subsequent provisions, embraced all accidents of every kind occurring off the premises, if caused by such employees in the discharge of the duties of their employment. Clearly, the purpose of paragraphs (6) and (7) of subdivision II was to except from the obligation created by the policy liability for damages arising out of accidents of the particular kinds and classes specified therein. Liability for all other kinds or classes of accidents except those so enumerated remained within the original obligation. Since such obligation was both conditional and general, such exceptions are not repugnant to the promise of indemnity contained therein but are valid limitations thereof. The court erred in holding them invalid."

See also *Sun Indemnity Co. v. Dulaney*, 89 S. W. (2d) 307 (Ky. App. 1936), to the effect that the parties have the right to insert such limiting agreements as they desire, as long as the limitation is a lawful one.

A good general statement of the principles involved is contained in Section 4255 of Appelman, 7 Appelman Insurance Law and Practice, as follows:

> "Where the obligation is expressed in the policy in general terms, it has been held that the insurer may insert as many clauses excepting particular risks from the general coverage as it sees fit, notwithstanding its obligation is materially limited by such exclusions. . . ."

Thus, under "Exclusions," Section (e), the wording is as follows:

> "This policy excludes any obligation of the Company . . . (e) Under Coverage A, for such bodily injury to or death of any employee of the Insured while engaged in the business of the Insured, other than domestic employment, or in the operation, maintenance or repair of the automobile, or to any obligation for which the insured may be held liable under any Workmen's Compensation;"

It is apparent from this wording of the Policy that the General Insuring Clause relied upon by appellee's counsel is limited by exclusion (e) so as to expressly not cover the deceased, if the deceased was for any reason an employee, and, thus, covered by the Workmen's Compensation Act at the time of his death.

Next, on pages 6 and 7 of appellee's reply brief, reliance is made on Section II, Subdivision 2 of the policy, and we judge, from the italicised parts thereof, that counsel is claiming that, no matter whether there be or be not coverage under the policy, the mere fact that the claim of the plaintiff against the assured is groundless or false or fraudulent, gives the defendant in the state court a right to a defense under the policy of the Company. The trouble with this contention is that it has been expressly denied by judicial decision. This very same contention was presented, as we indicated in our opening brief, in the case of *Ocean Accident & G. Corp. v. Washington Brick*

& T. C. Co., 148 Va. 829, 139 S. E. 513, where at page 517 of 139 S. E. the court specifically said that the insured was claiming that the insurer was bound to defend all suits and action, although they were "wholly groundless, false, or fraudulent." In that case the court specifically denied the applicability of the rule contended for here by appellee. The right to have the Company either defend or pay judgment, if any be rendered, must first have, as its foundation, coverage under the policy. To establish any other rule would be to unfairly burden the particular type of insurance involved with more than its share of insurance obligation—that would be the effect of a ruling which would deny to the Company the right to claim that there was no coverage and that therefore no obligation ever arose to perform any of the covenants of the policy. If the accident occurred under circumstances where coverage did exist, or if the facts alleged were such as to bring the case within the foundational covereage of the policy, then, and then alone, would the Company be required to defend, even though the claim might be fraudulent, or might be false, or might be entirely groundless.

On page 8 of appellee's reply brief—still under "Statement of the Case," counsel seems to present the contention that, since no judgment has been rendered, it cannot now be said that the controversy is one involving a claim in excess of $3000.00, so as to bring it within the general jurisdiction of the court. Here again, the trouble with appellee's contention is that the case law has decided this issue against him. In our opening brief, we pointed out

that in the case of *Commercial Casualty Ins. Co. v. Humphrey,* 13 Fed. Supp. 174, at 178, the court decided this issue by saying:

> "The test of jurisdiction is not what Pierce (Booze) may claim against plaintiff, but the maximum amount for which plaintiff may be liable under the policy." (Parenthetical insertion added.)

We cannot pass the opening statement without noting the comments on page 4 of appellee's reply brief, to the effect that Ray White, the alleged joint *tort feasor* in the state court action, is not here made a party. We assume that counsel is attempting to plead that Ray White is a necessary party. He does not, however, attempt to answer the facts set out in the opening brief, and the argument thereon, namely, that he, Ray White, has no interest of any sort in the policy of American General. As a joint *tort feasor,* he is not abused—in the legal sense of the word—by any result which may occur in this Declaratory Relief action. He may be interested in the *outcome* of this case from a purely practical point of view—that is, practical to him, *but he has* no legal interest in that outcome! Declaratory Relief cases provide for bringing in "interested parties." Some parties are necessary; others have only a legal interest in the outcome. It is for this reason that we bring into court the defendant Booze, who is the plaintiff in the state court action. He is the typical example of an interested party to the action. Mr. White does not belong in this case.

Answering Appellee's "Argument."

(1) The Question of Whether or Not the Facts Alleged Warrant Declaratory Relief.

In the first paragraph of this portion of appellee's reply brief a most peculiar statement appears—namely, that appellant "begs the question," because it assumes, "without proof" that the decedent Vernon Booze at the time in question was an employee of the defendant Frank L. Vincent." It is, of course, fundamental that when counsel comes into court, moving for the dismissal of the cause, as was done here, upon the ground that the facts stated give no jurisdiction to the court, the facts alleged in the declaration or complaint must be accepted as true in deciding that motion. In other words, the court must assume, for the purpose of the motion, that our allegations are true. It is for the purpose of proving them to be true, in the face of any controversion thereof, if any there may be, that we institute this action.

See:

Tahir Erk v. Glenn L. Martin Co., 116 Fed. (2d) 865 (C. C. A. 4th, 1941);

Curaco Trading Co. v. Wm. Stake & Co., 2 F. R. D. 308 (U. S. C. N. Y., 1941).

The next paragraph, on page 9 of the reply brief, concerning fraudulent claims, we have already answered.

The next contention first makes its appearance on page 10 of the reply brief. It seems to be substantially this: that since we admit that we executed and delivered the policy we are, *a fortiori*, required to defend the state court action, and pay the judgment, if any be rendered.

The discussion on pages 10 and 11 are so entirely void of any substance that it is with difficulty that it is resolved into any contention whatever. However, it appears to be predicated upon the proposition that when an insurance company issues a policy, it has no right to have the policy interpreted so that a legal adjudication of its meaning may be had. Such a contention is so foreign to logic that we think it needs no answer in this brief. We do again state that we admit, and have always admitted, the execution of the policy, and the fact that it was in full force and effect at the time the accident occurred. The question we are seeking to have determined is: What was that full force and effect? What is the legal interpretation to be given to the policy insofar as it relates—if it does relate at all—to the claim of the heirs of the deceased, Vernon Booze?

The very statement of counsel on these pages establishes, probably as strongly as we have already stated it, that there is a controversy between American General on the one hand, and Booze and Vincent on the other, concerning whether or not there is coverage. This coverage, if it exists, would subject American General to (1) immediately establish sufficient reserves to cover the possible judgment which *might* be rendered against Vincent; (2) establish reserves for payment of necessary additional investigation and defense of Mr. Vincent; (3) the payment of those costs and expenses as they became due; and (4) the payment of any final judgment which might be rendered against Vincent and in favor of Booze. It may be entirely improbable that such a judgment would reach the sum of $10,000.00, but that is "the maximum amount for which plaintiff may be liable under the policy" and, therefore, becomes the test of jurisdiction.

We are unable to follow the argument of counsel for appellee concerning the inapplicability of the case of *Maryland Casualty Co. v. Pac. Coal & Oil Co.*, 312 U. S. 270. We see no substantial difference between the provisions of the Ohio Statute and our own. Unless there was a failure of coverage under our policy—the very thing for which we are contending here—the plaintiff would have an immediate incontrovertible action against American General within the limits of American General's policy, predicated upon any final judgment entered against Frank L. Vincent.

Conclusion.

Paraphrasing some of the cases cited previously, there can be no question but that the cause of action in the state court was one for damages for wrongful death arising out of personal injuries, and also that it affirmatively appears, from the allegations of our complaint, that the injuries from which the death arose, were sustained out of, and in the course of the employment of the deceased; that the cause of action is between employer and employee; that the exclusive jurisdiction of the Industrial Accident Commission over such claim is well settled; and that the establishment of such a relationship entirely removes from consideration, by any of the parties in the state court, the automobile policy of the plaintiff American General herein. The purpose of Declaratory Relief actions is to have these matters determined before the risk is matured—before the coercion arises—with the enlightening help of an interpretation upon policy matters of this sort, all litigants in the state court will have a much clearer picture of what is before them. The hope of eventually pushing American General into the corner for some contribution will have faded, and with it may disappear all of the litigatious hopes of

plaintiff in the Superior Court. If this is true, it is a desirable result! Litigation predicated purely upon the supposition that an insurance company will pay something to dispose of a groundless claim is litigation of which we are well rid.

The right of judicial declaration of either liability or non-liability, predicated upon the happening of an accident and the issuance theretofore of an indemnifying policy, is a well established declaratory right. The demand that the insurer defend an action warrants an appeal to the court for a declaration of non-liability, where there is no coverage. If this were not true there is hardly a cause of action brought in our Superior Court but that the plaintiff might allege that, as a part of the transaction, the defendant was insured and that there is liability under the indemnity policy. Even in contract actions such allegations could be made and, if appellee's contention is right, the defendant would then have to appear and defend, even though the complaint was entirely foreign to the problem or matter for which the indemnifying policy was originally issued.

We submit that all of the cases established the right of appellant to a judgment predicated upon our ability to prove the allegations of our complaint. The issue was specifically determined in the case of *Merchants Mut. Cas. Co. v. Drown,* 199 Atl. 568, and we submit that there is in substance no attempt on the part of appellee to answer the decisions which we have set out in our opening brief and in this brief in substantiation of our right to a declaration on the terms of the policy.

Respectfully submitted,

FORREST A. BETTS,
Attorney for Appellant.